No. 22781

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUGH WENDELL MacDONALD,

Appellant,

vs.

JAMES A. MUSICK,

Appellee.

BRIEF OF PEOPLE OF STATE OF CALIFORNIA,

Appellee

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CITATIONS

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OPINION BELOW

The district court's order of November 27, 1967 denied the writ. The court's reasoning upon which the denial is based is set forth at pages 25 to 31 Volume Two of the reproduced transcript of record.

QUESTIONS PRESENTED

1. Whether the jurisdiction of the district court was property invoked in the request of a Writ of Habeas Corpus which requires the adjudication of the constitutionality of a California State Statute after the United States Supreme Court's dismissal of defendant's appeal for want of jurisdiction.

2. Whether a substantial federal question has been presented by appellant.

3. Whether appellant was denied due process of law.

STATUTES, RULES AND REGULATIONS INVOLVED

California Penal Code Section 834(a) Resistance to Arrest.

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest (Added Stats. 1957, c2147, p.3807, Section 10.)

California Penal Code Section 148 - Resisting Public Officers in the Discharge of their Duties: Penalty.

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Enacted 1872; AM. Stats. 1957 ch. 139, Section 30).

STATEMENT

On January 9th, 1965, appellant was arrested in Orange County and was charged with Violation of California Vehicle Code Section 23102 which prohibits driving any vehicle on a

public highway while under the influence of alcohol. An additional count charging Violation of California Penal Code Section 148 was added prior to the trial of the case.

Defendant was arraigned on January 14, 1965, on the charge of driving while under the influence of intoxicating liquor. On January 26th Deputy District Attorney Thomas A. Reilley moved to dismiss if defendant would stipulate to the existence of probable cause for the arrest. Defendant having refused to so stipulate the motion was withdrawn by Mr. Reilley. On February 2nd, Mr. Thomas A. Reilley having terminated his employment with the office of the District Attorney, Mr. Dave Bach Jr., assistant district attorney, and Mr. Harold Minyard, the deputy district attorney to whom the case had been re-assigned for trial requested the court's permission to amend the complaint by adding a charge of resisting arrest. The hearing on this motion was had on February 3rd and the motion was granted (See Trial Record).

During the argument of the February 3rd motion, Mr. Dave Bach Jr., Assistant District Attorney stipulated that "six deputy district attorneys indicated either displeasure with the case, or that it was a weak case, or that they would not care to prosecute it" (Trial Record 14-15). He further stipulated that if Mr. Wells, one of the deputies, were called to testify he would admit having stated to appellant's attorney that "it appears that the police department has a hard on against this defendant and are out

to get him' or words to that effect" (Trial record 15-17).

A trial by jury was had on February 11, 1965. The evidence indicated that on the evening of January 8, 1965, appellant was observed driving along a street in an unusual manner. When the officer noticed the passenger in appellant's car putting a wine bottle to his lips and apparently drinking from it, and casting it out of the window onto a public beach area, the automobile was stopped. The officers testified that defendant was unsteady in his gait, that his eyes were glassy, that he refused a field sobriety test claiming a bad leg (Trial Record 83-89). Defendant admitted to having resisted the officers in the discharge of their duties while at the police station (Trial Record 83-89).

The jury found the appellant Not Guilty of the drunken driving charge but guilty of a violation of Section 148 of the California Penal Code. Appellant was sentenced to a fine of $250 plus penalty assessments.

On February 15, 1966, the Appellate Department of the Superior Court affirmed appellant's conviction. Certification of the case to the District Court of Appeals was denied by the Appellate Department of the Superior Court and the judgment became final on March 9, 1966. Appellant appealed to the United States Supreme Court and appellee filed a motion to dismiss. The Supreme Court of the United States granted appellee's motion and dismissed the appeal for "want of jurisdicition." Treating the documents as a request for

certioriari, it denied certioriari.

On April 7th, 1967 Appellant petitioned the United States District Court, Central District of California, for a Writ of Habeas Corpus. After a hearing, that Court by order No. 67-498-1H entered and filed August 18, 1967 denied the petition on the ground that defendant had no standing to prosecute a petition for the writ because he was not in custody.

On September 29, 1967 the Appellant once more petitioned the United States District Court, Central District of California, for a Writ of Habeas Corpus. The court, having considered the petition on the merits denied the petition by order No. 67-1432-JWC entered and filed November 27, 1967.

The case is now pending before this court on appeal from that denial.

SUMMARY OF ARGUMENT

I

The granting of appellee's motion to dismiss the appeal by the Supreme Court of the United States is a final adjudication on the applicability of the state statute to the decision of this case and appellant should not be allowed to relitigate that issue on Habeas Corpus proceedings.

II

Denial of certioriari implies a finding by the Supreme Court of the United States that defendant's constitutional

rights have not been violated.

III

The record clearly shows that there was probable cause for the arrest; that at no stage of the trial was the prosecution conducted on the basis of Section 834(a) and hence that the constitutionality of the statute is not in question.

IV

Section 834(a) of the California Penal Code is constitutional hence appellant has not raised a federal question.

V

The statements allegedly made by deputy district attorneys not involved in the prosecution of the case are immaterial and do not show the manifest bad faith of the prosecution in pressing charges alleged by appellant. Appellant, therefore, has failed to prove lack of due process.

ARGUMENT

Dismissal of the appeal by the United States Supreme Court is a final determination of the inapplicability of the state statute in this case.

In determining and delineating the jurisdiction of the Supreme Court of the United States Section 28USC1257 states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
> 1. By appeal where is drawn in question the

validity of a statute of any state on the ground of its being repugnant to the Constitution, Treaties or Cases of the United States and the decision is in favor of its validity.

.....

3. By Writ of Certioriari where the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution, Treaties or laws of the United States, or where any title, right, privilege or amnity is specially set up or claimed under the Constitution.

Under the above statute the Supreme Court has appellate jurisdiction if there is a claim of unconstitutionality of a state statute which has been declared constitutional by the state court in all cases where a party has standing to sue and where the statute which has been declared constitutional is necessarily involved in the determination of defendant's guilt.

A careful scrutiny of the pleadings involved in the appeal filed with the United States Supreme Court in this case and a comparison with the jurisdictional requirements set out above gives clear meaning to the opinion rendered by the Supreme Court.

The record (supplemented by the transcripts lodged with this honorable Court) shows the following facts:

The constitutionality of a state statute as well as lack of due process were strongly alleged by Appellant in his petition to the Supreme Court.

The Supreme Court, while having the case under consideration and prior to issuing its opinion requested knowledge

of whether the case had been reviewed by the Supreme Court of the State of California (See Attachment A).

The District Attorney filed an "Additional Response Regarding Jurisdiction" sustaining appellant's contention that the remedies in the state court including Habeas Corpus proceedings had been exhausted because not available (See Appellant's Supplemental Brief re Jurisdiction In The Supreme Court of the United States - October Term 1966 No. 503 Misc. p.5; cf Additional Response Regarding Jurisdiction filed by appellee in the same proceedings).

Appellee filed with the Supreme Court a motion to dismiss alleging that the state statute claimed to be unconstitutional was not directly drawn in question in the lower courts and was not crucial to the disposition of this case; that the record on its face showed the arresting officer to have probable cause for the arrest and therefore that there was a presumption in favor of the legality of the arrest; and that the conviction of defendant could well have been and was in fact determined on factors other than the alleged "manifest bad faith of the prosecution."

The Supreme Court bottoming its ruling on a review of the "statement of jurisdiction, the motion to dismiss and the transcript of record" states:

> On consideration whereof, it is ordered by this court that the motion to dismiss the appeal herein be, and it is hereby, granted. It is further ordered that the appeal herein be, and it is hereby, dismissed for want of jurisdiction."

In light of the provisions of 28 USC 1257(1) supra, and of the proceedings above stated, what can be the meaning of the granting of the motion to dismiss, of the dismissal of the appeal for want of jurisdiction, and of the court's denial of certioriary?

To say, as appellant does, that the court's decision stems from one of a myriad of possibilities, or to dismiss the order of the court as "confusing because the Supreme Court dismissed the case for lack of jurisdicition rather than for want of a substantial federal question as is their usual practice in discretionary dismissal of this nature" (R.T. on appeal p.5) is without justification. The statements presumes sloppiness on the part of the highest court of the land. Such presumption is unwarranted and contrary to legal principles which advocate just the opposite.

The meaning of the order must rather be diligently sought in a determination of which of the requisites to the jurisdiction of the court are lacking in appellant's case.

1. Has the statute in question been declared constitutional by the highest state court available to appellant?

The answer is yes. While the determination of the statute's constitutionality was not made by the Supreme Court of the State of California, it had been made by the highest court available to defendant and this is sufficient to satisfy the requirement. The case at hand in no way

differs from Largent v. State of Texas 318 US 418. There, as here, the defendant had obtained an appeal from the highest court available to him and the Supreme Court granted certioriary to determine the constitutionality of the state statute. In light of the authorities, therefore, it can only be concluded that the court did not lack jurisdiction on this ground.

2. Has Appellant standing to sue?

Again, the answer is in the affirmative. Were the statute involved in a determination of his guilt the penalty in this case is sufficient even if in the form of a fine. See Largent vs. State of Texas, supra (defendant in that case had been fined $100).

3. Is the constitutionality of a state statute in issue in this case?

Since this is the third and last requirement for the appellate jurisdiction of the Supreme Court it can only be on this ground that the motion to dismiss was granted and the appeal dismissed "for want or jurisdiction."

This conclusion is further supported by the allegations supporting appellee's motion to dismiss. Appellee, in addition, to the constitutionality of the state statute, alleged that the state statute was not in issue, and that there had been no denial of due process.

Moreover, had the court based its ruling on a determination of the constitutionality of the California

statute, it obviously would not and could not have dismissed for lack of jurisdiction. By a process of elimination therefore, it can only be concluded that the Supreme Court based its "want of jurisdiction" ruling upon determining, after an analysis of the record, that the constitutionality of the state statute was not in question.

For all the above reasons Appellees respectfully submit that the order of the Supreme Court dismissing the appeal clearly indicates a finding that appellant's contention that his conviction was based on 834(a) of the California Penal Code are without merit. Accordingly, Appellee urge this court to exercise its discretion by denying the Writ of Habeas Corpus in that this court cannot find Appellant to be "in custody in violation of the constitution or laws or treaties of the United States" as required by 28 USC 2241(C)(3) See also Smith vs. United States 223 F2d 750.

The Supreme Court of the United States in Ex Parte Hawk 321 US 114 sets out the rules controlling the discretion of a federal court in Habeas Corpus proceedings involving state court decisions.

> Where the state courts have considered and adjudicated the merits of his contentions, and this court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of Habeas Corpus the question thus adjudicated. See also Mills v. Ragen 77 F Supp. 15,18.

The wisdom of this rule is beyond argument. Having the

Supreme Court of the United States denied an appeal on the issue now before this court a review of the constitutionality of the state statute by the highest court of the land would be less than probable in this case. And since the Supreme Court of California has recently favorably passed on the constitutionality of that same statute (See People vs. Coffey 60 Cal. Rptr. 459, 468), the decision of this court would then be directly in conflict with that decision without hope of a final resolution. Judicial discretion would thus seem to require the finding not to be lightly reversed where no final review is probable. cf Mooney v. Holohan 7 F Supp.385

II

The denial of certioriari implies a finding by the Supreme Court of the United States that Appellant's Constitutional rights have not been violated.

The same jurisdictional statute 28 USC 1257(3) supra, delimites the jurisdiction of the Supreme Court in granting certioriari. Since that statute provides for jurisdiction in all cases where a constitutional right has been violated, it cannot reasonably be argued that had the court found a lack of due process in appellant's case the court's jurisdiction would have been lacking.

Had the Supreme Court determined the constitutionality of the statute not to have been in question but had it also found that defendant's constitutional rights of due process had been violated, it would have granted the motion to dismiss

the appeal but it could also have granted certioriari, determined the merits or remanded the case to the state court. Thus in Henry vs. Louisiana, 88 S.Ct. Rptr. 2274, for example, the court orders:

> The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certioriari, certioriari is granted and the judgment is reversed.

In the case at hand the court's ruling on the matter of certioriari merely states:

> Treating the papers whereon the appeal was taken as a petition for writ of certioriari, certioriari is denied.

It is true that, as defendant has contended, the Supreme Court could have considered this a case of "discretionary jurisdiction,"(RT on appeal p. 5) and thus denied the writ without qualification. In light of the recent case of Wainwright vs. City of New Orleans 88 S. Ct. Rptr. 2243, however it is far more probable that had the court found the issue to have been justiciable it would have granted the writ. In that case defendant had been arrested on suspicion and without probable cause. He was not tried for any offence except that of resisting arrest. Certioriari was sought on the ground that since there was no probable cause for the arrest the arrest was illegal and his conviction for resisting arrest deprived him of his freedom from unreasonable seizures. While the Supreme Court dismissed the writ as improvidently granted (id at 2244), two concurring and two dissenting opinions were

filed - a clear indicia of the Supreme Court's interest in the matter and of its intention to adjudicate the issue when the opportunity presents itself. It can, therefore, only be concluded that had the Supreme Court found the issue to be justiciable in this case, it would have granted certioriari and its denial can only imply a failure on appellant's part to present a justiciable issue.

III

The record clearly shows that there was probable cause for the arrest and that at no stage of the trial was the prosecution conducted on the basis of Section 834(a).

The decision of the Supreme Court in granting appellee's motion to dismiss is supported by the record. The defendant-appellant was arrested for drunken driving and charged with the additional violation of section 148 of the Penal Code which punishes resisting, delaying or obstructing an officer in the performance of his official duties. At no stage of the trial was the prosecution based or conducted on the basis of Section 834(a).

The record shows that the officers noticed defendant's erratic driving and saw defendant's passenger bring a wine bottle to his lips in the motion of drinking and thereafter throw the bottle outside of the car window (Trial Record 83-87). These acts suffice to give the officers reasonable cause to arrest defendant in that they had seen a misdemeanor

committed in their presence. Not only did the officers have reason to believe that defendant might be in violation of the California Vehicle Code Section 23102(a) which prohibits driving while under the influence of alcohol but also of California Vehicle Code Section 23123 which prohibits the owner of an automobile from allowing open liquor containers in his car and which imposes upon him the duty of prohibiting his passengers from possession of such containers.

In addition, after stopping the car, the officers testified that the defendant had a "rather strong odor of alcohol" on his breath, walked unsteadily, had glassy eyes, and refused to take any type of field sobriety test (Trial Record, 83: 21-89:3). Against the weight of the above evidence, amply justifying defendant's arrest, the mere fact that appellant was subsequently acquitted of this charge has no bearing whatever on the previously existing reasonableness of the officer's conduct. Thus the legality of the arrest is not and cannot be made to depend on guilt or innocence but can only depend on the fact that the officers had probable cause to believe that the defendant was committing a misdemeanor.

The appellant, has shown no facts which indicate that the arrest was other than lawful. The inconstitutionality of Section 834(a), therefore, would not in any way have altered the outcome of appellant's case and appellant has no standing to argue against its constitutionality. See Cramp vs. Board of Public Instruction of Orange County Florida,

368 US 278, 82 SCT 275, 7 L.Ed Id 285.

IV

Even if Section 834(a) of the California Penal Code were applicable to this case, the writ should be denied because the section is not violative of the of the constitution of the United States.

The Legislature of the State of California was properly within its authority in enacting Penal Code Section 834a, under the State's police powers to execute and enforce laws for the general welfare of all its citizens. Section 834a was designed and intended to replace breaches of the peace which might, and probably often did, occur when a citizen believed his liberty was being infringed by an arrest he considered unlawful. The legislative intent in enacting Section 834a in 1957 is clear from the fact that prior to the enactment of this section, the cases in California (See e.g., People v. Craig, 152 Cal. 42, 9P. 997; People v. Perry, 79 C.A. Id 906. 180 P.2d 465) construed Penal Code Sections 692-694 (which permit lawful resistance to acts which constitute a public offense) to include legislative permission to resist an unlawful arrest. The rationale of those cases was that an unlawful arrest is a "public offense," hence resistance to such unlawful arrest was justified and not a crime (See 5 Cal Jur. 2d 187). Section 834a, however, is wholly devoid of any distinction between resistance to a lawful and an unlawful arrest. The omission of any such distinction was clearly

more than inadvertent, since a legislative intent to change current law may be presumed from a new legislative enactment on the same subject. People v. Weitzel, 201 Cal. 116, 255 P. 792. Further, the only reported Calif. decision to directly consider this identical question since enactment of Section 834a upheld Section 834a as constitutional in the face of the argument identical to that made by Appellant here. People v. Burns 198 C.A. 2d. 839. This decision was in accord with the American Law Institute's recommendations in its Model Penal Code, Section 304, subsection 2 (a)(i), which states that one is not privileged to resist an arrest which the actor knows is being made by a peace officer even though the arrest might be unlawful. It was also in accord with the Interstate commission on Crimes' Uniform Arrest Act, Section 5, the equivalent of which has now been adopted in New Hampshire, Rhode Island, Delaware and California, and is now pending as a bill before the New York legislature. New Jersey also adopted the equivalent of Section 5 by judicial decision in 1965. State v. Koonce, 89 NJ Super. 169, 214 A. 2d 428. Recently the Burns decision supra, has been cited with approval by the California Supreme Court in People v. Coffey supra.

Penal Code Section 834a, it should be noted, does not say that one has a duty to refrain from resisting arrest if the arrest is lawful, but rather requires a person to refrain from using force... whenever he has knowledge or...should have knowledge that he is being arrested by a peace officer..

The simple reason for this is that the former rule allowing resistance to an unlawful arrest often fomented riot or breach of the peace by making the question of the lawfulness of the arrest a subjective one, one which the subject of the arrest could interpret. The 1957 enactment by the legislature thus was passed to make the law on this matter clear, definite and subject to uniform interpretation, while at the same time safeguarding the welfare of the citizenry generally. The double effect of this new statute, clarification of law and protection and maintenance of the public peace and welfare, is most laudable. The statute is consistent with the concept of due process, especially when balanced against the fact that one who is unlawfully arrested has a full, adequate, and peaceful recourse to the courts for redress of this wrong. When the above factors are weighed against each other, the scales of due process should balance in favor of the statute, and leave the relatively few people who are falsely arrested to their remedies in the courts of law.

V

The statements made by the prosecution do not support Appellant's charge of "manifest bad faith in pressing charges."

The United States District Court in ruling on whether the actions of the deputy district attorney deprived defendant of due process reasoned thus:

> I have given a lot of thought to this matter. I think the difficulty here is a failure to completely under-

stand the duties and responsibilities of the police and the duties and responsibilities of the District Attorney. When there is a confrontation with the law, it is an episode which may give rise to a number of offenses.

"You say there was no profanity. I don't know. There could have been profanity here. There could have been a use of force sufficient to constitute breach of these and perhaps some other violations that grew out of this incident.

But the police determined to charge the defendant with two violations, one, of course, driving while under the influence of intoxicating liquor, and the other, resisting an officer.

Now, somewhere along the line the police indicated that they were not going to prosecute on the second one. Whatever they may have said, that they were going to drop it or not prosecute, whatever, they don't have the ultimate decision as to whether there is going to be a prosecution on it or not. All they are saying in effect is we are not going to suggest or recommend, as far as we know that charge is not going to be prosecuted.

With respect to the whole situation it ultimately gets to the District Attorney. The first thing that the District Attorney looks at when a case of this kind or, for that matter, any case comes to him is: Is this the kind of an infraction of the law, is this such a violation, such a case, when you look at it within its four corners that justifies the expenditure of public funds to prosecute.

Whether the man is guilty or not guilty, is this worthwhile?

If the prosecutor prosecuted every case that was brought to him by the police and by the people he would require a staff many, many times what it is. The first thing he does is determine whether there is sufficient social significance to justify the expenditure of public funds.

I can see in this case, looking at it in the first place that we have a case of a charge of drunk driving that we can't substantiate. We do have a case of resisting an arrest, which they could probably substantiate, but it isn't of sufficient significance to justify the expenditure of public funds. So that the District Attorney says, "We are willing to dismiss it." Whereupon the defendant says he will not stipulate to probable cause, which is a neon light signaling: "I am going to bring an action against the City and sue them for false arrest."

Well, that changes the picture. The District Attorney again evaluates the situation and he says: Whereas this is a case which did not heretofore justify the expenditure of public funds, all of a sudden it does become a case which does justify the expenditure of public funds because we are going to have to defend this case one time or another, and since the defendant is not going to stipulate to probable cause and is going to sue us, we might just as well try it now when the defendant has got something to lose as well as

something to gain, as contrasted to waiting until later when he hadn't got anything to lose and everything to gain."(RT on appeal pp. 26:15-29:3)

The validity of the Court's argument is self evident. But in the case now before this court yet another argument is available. The record and the documents before this court clearly show that Deputy District Attorney Riley agreed to move for dismissal of the action because defendant had promised to stipulate as to the existence of probable cause for the arrest. When defendant refused to so stipulate, the deputy was no longer bound by his motion for dismissal. Additionally, no other deputy could be bound by Deputy Riley's personal opinion of the case since when the motion to add the count of resisting arrest was made and granted on February 2 and 3, 1966, Deputy Riley was no longer with the office of the District Attorney. The deputies to whom the case was assigned, the only ones who in fact had control of the cause of action, never stipulated that <u>they</u> thought the case had no merit. They merely stipulated that "six of the deputy district attorneys indicated either displeasure with the case, or that it was a weak case, or that they would not care to prosecute it." (Trial Record 14-15)

Nowhere in the record does it show that any of them ever had control of the case. Appellee respectfully submit that the thoughts of any attorney of member of the District Attorney's staff, other than of the one charged with the

prosecution of the case, are immaterial and cannot possibly have deprived appellant of any rights.

Moreover, any question of bad faith in this case is moot, since the allegation by appellant of an unmeritorious prosecution concerns prosecution of the "Driving While Intoxicated" charge, of which on the trial thereof appellant was acquitted, and of which acquittal he is not, of course, seeking review (See e.g., Trial Record 7:24-8:34; 13:15-25). While counsel for Appellant has tried to utilize the stipulations made by prosecution (regarding what the testimony of certain deputy district attorneys would be as to the prosecution of the "Driving While Intoxicated" charge) to somehow prove an unmeritorious prosecution of the "Interference with an Officer" charge, Appellant's reasoning under this argument is somewhat obscure. The stipulations in question, it bears repeating, concern only the merits of the prosecution of the "Driving While Intoxicated" charge of which Appellant was acquitted (Trial Record, 15: 3-23). Because of this acquittal, there thus exists no genuine controversy as to the motives of the prosecution, the existence of which controversy this Court has long insisted upon as a condition precedent to review. Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 65 S. Ct. 1395.

But even if the stipulations as to the beliefs of some of the prosecutors in the District Attorney's office regarding the unmeritorious nature of the prosecution were found to

encompass the prosecution of Appellant on both charges and had been made by the deputy in charge of the case, such stipulations do not show either that the prosecution was unmeritorious or that Appellant was in any way denied due process of law thereby. Clearly, there was some merit in the prosecution of the "Interference with an Officer" charge or the jury would not have found the defendant guilty, nor would the Appellate Court have affirmed that finding. Further, the filing of an amended complaint, even to add a charge which had earlier been deleted from the record of Appellant's arrest, is not "ample evidence of the bad faith, the coercion, the blackjacking of defendant" as the Appellant contends (Trial Record, p.8:18-22). On the contrary, not only has this been a frequent practice for no other motive than to protect the people by ensuring that their laws are enforced, but has long been authorized by California law (California Penal Code Section 1009; also see Trial Record, p.12:1-14). Furthermore, the prosecution of any crime has historically been within the discretion of the District Attorney--if that office believes there is even a possibility of a conviction they may, within their discretion, choose to prosecute.

Similarly the reference to the police department's wanting "to get" Appellant (Trial Record p. 12:2-15) being as it is, heresay of what someone believes yet another party's motive to be, cannot be found to be, as proposed by Appellant, the motive for the prosecution of the "Interfering with an

Officer" charge since, even if accepted as factual, such hearsay statement at most would apply only to the particular state of mind of the police department, and would in no way reflect the motives of the prosecuting attorneys. And, it is of course, the motives of these latter individuals which Appellant is impugning. (Furthermore, from the record it is entirely unclear as to whether the alleged statement was said with reference to the drunk driving or the "Interfering with an Officer" charge.) Thus, the state of mind of the police, like the stipulations of the District Attorney, in no way proves that the prosecution of the defendant for interfering with an officer was in bad faith, and therefore presents no question of due process in this case.

In conclusion Appellees respectfully submit that Appellant's charge of lack of "good faith" is based upon faulty and illogical reasoning. Although Appellant states that Appellee prosecuted the "Driving While Intoxicated" charge by "implementing a second crime to substantiate and win the first crime" (Trial Record, p. 14:5-14), the precise rational nexus to explain <u>how</u> the amended complaint was "implemented" to "substantiate and win" the drunk driving charge is missing. Additionally, Appellant's allegation of a bad faith prosecution by the District Attorney <u>presumes</u> that such bad faith has been proved as the motive of the District Attorney for prosecuting this case. There is no such proof in the record; in fact, such presumption is incontrovertably rebutted by

statements, made in open court by counsel for the People, to the effect that he believed he "could get a conviction of the drunk driving" (Trial Record p.11:19), and that he believed that the "Interfering with an Officer" charge was even stronger than that of "Driving While Intoxicated" (Trial Record, p.11:23-24).

Defendant's argument that by adding the charge of resisting arrest, Appellant's rights are violated because his chances of being found guilty have been increased by this addition is specious. It is not the job of the prosecution to determine guilt or innocence--only the jury can do that--and only if defendant is guilty of the additional offense can his chances of being found guilty be increased.

CONCLUSION

For all of the foregoing reasons it is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

By: _____
MICHAEL CAPIZZI, Deputy

And

By: _____
ORETTA D. SEARS, Deputy

DECLARATION OF SERVICE BY MAIL

I, ENID H. KASS, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 212 West Eighth Street, Santa Ana, California; I served a copy of the attached Appellee's Answering Brief on each of the following, by placing same in envelopes respectively addressed as follows:

VASKEN MINASIAN
HILLEL CHODOS
9107 Wilshire Boulevard
Beverly Hills, California 90210

A. L. WIRIN
FRED OKRAND
LAWRENCE R. SPERBER
257 South Spring Street
Los Angeles, California

Each said envelope was then, on July 31, 1968, sealed and deposited in the United States mail at Santa Ana, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of July, 1968, at Santa Ana, California.

Enid H. Kass
ENID H. KASS